JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 912

CONTRACTORS CARGO CO., *Appellant*,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
DEALERS TRANSIT, INC.,
PROGRESSIVE TRANSPORTATION CO.,

and

J.H. ROSE TRUCK LINE, INC., *Appellees*.

Appeal From the United States District Court for the Central District of California

RESPONSE TO MOTIONS TO AFFIRM

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Appellees deny that substantial questions are presented in appellant's Jurisdictional Statement and in separate motions urge affirmance of the judgment below. It is not immoderate to state that the respective motions to affirm are largely non-responsive. They do not pretend to help guide the court through the inter-

pretative thicket by dealing directly with the core issue of how the agency arrived at its ambiguity determination.

There is more than a shade of naivete about the Commission's analysis of its own action. This appellee dogmatically states (Motion, p. 4) that resort was had to the underlying record only after a finding of ambiguity. Yet it stands mute on the fact that the prior record was admitted (J.S. 5) and that specific inquiry was made by that agency into the intent at the time of issuance (J.S. 6 et seq) before considering its usual rule of construction. Presumably, the Commission would have the court believe that the words "intended" and "contemplated", as used by the agency in interpreting appellant's permit, are not to be understood in their normal sense. Further, the agency offers no reason for not giving effect to its own long recognized rules of construction nor does it refute that the application of a new test in this case will become endemic to all holders of traditionally non-radial rights.

By any standard, save sheer administrative fiat, the ambiguity determination in this instance went beyond the permissible limits of inquiry. While the Commission enunciated (J.S. 6) the cardinal rule that the permit must be construed according to its terms, regardless of the initial intent, it ignored such principle with the acquiescence of the court below. The issue raised here is insubstantial only if the agency has been perpetuating a myth when it says that the original intent behind a grant is inconsequential. In that event, contrary to *McCormack Trucking Co. v. United States*, 251 F. Supp. 526, 538 (1966) a holder actually may not rely upon the terms of the authority

without consulting the original grantee or perusing voluminous records.

The Commission does not lay claim to any administrative expertise in construing this non-technical territorial description, in the light of the second *McCormack* case. Instead, it makes an abortive effort to distinguish that decision. It asserts that such case is inapposite because there was no agency vacillation here and the language of the (sic) certificate is, if anything, more consistent with radial authority than with non-radial (Motion, p. 5). The novelty of reading the missing words of extremity into the language of the permit supplies the vacillation of which the agency speaks. If the Commission made a mistake in wording the original grant, it did nothing to correct such mistake in the course of approving the successive transfers. An agency becomes deaf to the demands of fairness when it voices the basic rules of interpretation and then proceeds to ignore them.

Appellee-carriers seek to justify the ambiguity findings on grounds that appellant originally interpreted its permit as allowing service, in some instances, outside of the six-state area and that different interpretations were advanced at the hearing (Motion p. 8). The sole issue here is whether the permit confers radial or non-radial territorial authority. Such inquiry involves no question of whether appellant may operate beyond the six-state area. Furthermore, the agency did not rely upon such testimony in arriving at its findings of ambiguity. Appellee-carriers are free to abandon any pretense of supporting the decision upon the ground stated by the agency but such considerations have no relevance here. Appellee-carriers further undercut their own position by the

somewhat anomalous assertions that appellant's interpretation is supported by neither the *plain meaning* of its permit nor the antecedent record. (Motion, p. 9 et seq) If the language has a plain meaning, any resort to the prior record was idle and prejudicial and it would be immaterial whether appellant agreed or disagreed with the agency's current interpretation of that record. Further, if appellee-carriers are correct in stating (Motion, p. 9) that the use of the words of extremity is not mandatory in delineating radial grants and that the permit has the same connotation without such language, why then did the agency itself (J. S. 7) retroactively graft that very language upon the permit?

While mere differences of opinion do not constitute a legal basis for an ambiguity finding, appellant's understanding of the meaning of its own permit does have relevance to its innocent purchaser status. We fail to follow appellee-carriers' reasoning in suggesting a connection between the alleged scope of operations of appellant's immediate predecessor and the *glaring error or inconsistency finding* that was volunteered by the lower court. The only legal opinion which appellant had as to the territorial scope of its permit up to the time that its present management acquired control of such company corresponded with the interpretation advanced here. The evidence of record establishes that appellant's predecessor held himself out to provide service consistent with that interpretation and had rates on file covering such service (TR 172, 212 et seq, 219-220). It was not until after appellant's present management acquired control of the company that any questions were raised concerning the operations being conducted by appellant

(TR 217-218). In the premises, appellant is entitled to fuller protection than a participant in the original proceeding and the court below was not justified in advancing its own independent findings, which are now adroitly adopted by appellees.

The questions presented are substantial and deserve the plenary consideration of the court.

Respectfully submitted,

CONTRACTORS CARGO CO.

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CERTIFICATE OF SERVICE

I, William P. Sullivan, attorney for appellant Contractors Cargo Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 15th day of January, 1970, I have served copies of this Response To Motions To Affirm on attorneys of record of each of the parties hereto as follows:

By first class mail, in duly addressed envelopes, with first class postage prepaid, to the following:

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